

AMENDED IN SENATE APRIL 20, 2005

SENATE BILL

No. 378

Introduced by Senator Morrow
(Coauthor: Senator Ashburn)
(Coauthor: Assembly Member Tran)

February 17, 2005

An act to amend ~~Section 68665~~ Sections 15402, 68511.5, 68664, and 68665 of the Government Code, and to add Chapter 1.5 (commencing with Section 1509.1) to Title 12 of Part 2 of the Penal Code, relating to ~~prisoners~~ death penalty appeals.

LEGISLATIVE COUNSEL'S DIGEST

SB 378, as amended, Morrow. Death penalty appeals: appointment of counsel.

Existing law provides for the creation of the Habeas Corpus Resource Center to provide counsel for persons convicted and sentenced to death, who are without counsel and determined to be indigent.

Existing law requires the Judicial Council and the Supreme Court to adopt, by rule of court, binding and mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings.

This bill would provide that these standards shall require appointed counsel to be a member in good standing of the State Bar; ~~for a total of 5 years and have at least 3 years' experience in the practice of criminal law; and have participated in at least 5 felony jury trials, 5 felony appeals, 5 capital postconviction evidentiary hearings, or a combination of 5 of those proceedings handling appeals or postconviction felony proceedings. The court may, for good cause, appoint an attorney not meeting these requirements.~~

Existing law provides that the executive director of the Habeas Corpus Resource Center be chosen by a 5 member board and confirmed by the Senate. The board members are appointed by various Appellate Projects.

This bill would require each Justice of the Supreme Court to appoint a board member, and the board would be increased to 7 members.

Existing law provides for the employment and supervision of the attorneys of the State Public Defender, as specified. This bill would provide that the State Public Defender shall maintain no less than 127 funded positions, including 67 attorney positions.

Existing law establishes the procedures for the appointment of counsel in indigent criminal appeals when it is other than the State Public Defender.

This bill would provide that in noncapital cases the appointee must apply to the Supreme Court within 6 months of meeting competency standards, or in capital cases, to have been appointed by the Supreme Court.

This bill would further provide an expedited system of reviewing cases in which a death sentence is imposed. These provisions would be the only procedures for challenging a conviction that resulted in a sentence of death, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 15402 of the Government Code is
2 amended to read:
3 15402. The State Public Defender may employ deputies and
4 other employees, and establish and operate offices, as he or she
5 may need for the proper performance of his or her duties. The
6 State Public Defender may contract with county public
7 defenders, private attorneys, and nonprofit corporations
8 organized to furnish legal services to persons who are not
9 financially able to employ counsel and pay a reasonable sum for
10 those services pursuant to the contracts. He or she may provide
11 for participation by those attorneys and organizations in his or
12 her representation of eligible persons. The attorneys and
13 organizations shall serve under the supervision and control of the

State Public Defender and shall be compensated for their services either under those contracts or in the manner provided in Section 1241 of the Penal Code.

The State Public Defender may also enter into reciprocal or mutual assistance agreements with the board of supervisors of one or more counties to provide for exchange of personnel for the purposes set forth in Section 27707.1.

~~The~~
In order to ensure indigent defendants the effective assistance of counsel in the implementation of Section 15421, the office of the State Public Defender may hire 15 additional staff attorneys and the support staff necessary for proper implementation of Section 15421 shall maintain no less than 127 funded positions, including 67 attorney positions.

SEC. 2 Section 68511.5 of the Government Code is amended to read:

~~68511.5. Not later than January 1, 1985, the~~ *The* Judicial Council shall adopt rules of court regulating the selection of appointed counsel, other than the State Public Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts, ~~and require appointees to noncapital cases to have either applied to the Supreme Court within six months of meeting the court's competency standards or been appointed by the Supreme Court to represent an indigent defendant in a death penalty appeal or post-conviction review appeal.~~ In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office of the State Public Defender.

SEC. 3 Section 68664 of the Government Code is amended to read:

68664. (a) The center shall be managed by an executive director who shall be responsible for the day-to-day operations of the center.

(b) The executive director shall be chosen by a ~~five-member~~*seven-member* board of directors and confirmed by the Senate. Each ~~Appellate Project~~*Justice of the Supreme Court* shall appoint one board member, all of whom shall be attorneys. However, no attorney who is employed as a judge, prosecutor, or in a law enforcement capacity shall be eligible to serve on the board. The executive director shall serve at the will of the board.

(c) Each member of the board shall be appointed to serve a four-year term, and vacancies shall be filled in the same manner as the original appointment. Members of the board shall receive no compensation, but shall be reimbursed for all reasonable and necessary expenses incidental to their duties. The first members of the board shall be appointed no later than February 1, 1998.

(d) The executive director shall meet the appointment qualifications of the State Public Defender as specified in Section 15400.

(e) The executive director shall receive the salary that shall be specified for the executive director in Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2.

SECTION 1.

SEC. 4. Section 68665 of the Government Code is amended to read:

68665. The Judicial Council and the Supreme Court shall adopt, by rule of court, the following binding and mandatory competency standards for the appointment of *lead* counsel in death penalty direct appeals and ~~habeas corpus proceedings~~*postconviction review appeals*:

~~(a) Member in good standing of the State Bar.~~

~~(b) At least three years' experience in the practice of criminal law.~~

~~(c) Participation in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings, or any combination of at least five of these proceedings.~~

(a) The attorney must have been admitted to practice in California or another state for a total of five years and have at least three years experience in the handling of appeals or postconviction proceedings in felony cases. The court shall consider experience in defense and prosecution equally for this purpose.

1 **(b)** *The court, for good cause, may appoint an attorney not*
2 *meeting the requirements of subdivision (a) whose background,*
3 *knowledge, or experience would otherwise enable him or her to*
4 *properly represent the defendant, with due consideration to the*
5 *seriousness of the possible penalty and to the unique and*
6 *complex nature of the litigation.*

7 **SEC. 5.** *Chapter 1.5 (commencing with Section 1509.1) is*
8 *added to Title 12 of Part 2 of the Penal Code, to read:*

9
10 **CHAPTER 1.5. DEATH PENALTY APPEALS**
11

12 **1509.1.** *The purpose of this chapter is to establish an*
13 *expedited system of review of cases in which a death sentence is*
14 *imposed, in order to achieve the following goals:*

15 **(a)** *Comply with the requirements Chapter 154, Title 28,*
16 *United States Code in order to obtain the benefit of expedited*
17 *federal habeas proceedings under that chapter.*

18 **(b)** *Improve the accuracy, completeness, and justice of review*
19 *proceedings by requiring that postconviction review commence*
20 *immediately after the imposition of a sentence of death and that*
21 *factual questions be resolved in the forum best suited to resolve*
22 *them.*

23 **(c)** *Allow for the full and fair examination of all legally*
24 *cognizable postconviction issues by the trial court and the*
25 *California Supreme Court.*

26 **(d)** *Eliminate, to the fullest extent possible, unreasonable and*
27 *unjust delays in the resolution of postconviction issues by*
28 *reducing the number of proceedings in capital cases.*

29 **1509.2.** **(a)** *Notwithstanding any other statute or rule, a*
30 *motion under this chapter and the direct appeal are the only*
31 *procedures for challenging a sentence of death or the conviction*
32 *that resulted in the sentence of death, except that a claim of*
33 *ineffective assistance of appellate counsel may be made in a*
34 *habeas corpus petition to the California Supreme Court.*

35 **(b)** *This chapter applies whether the sentence of death was*
36 *imposed before or after the effective date of this chapter, except*
37 *as provided in subdivision (c) and except as required by the*
38 *California Constitution or by the Constitution or laws of the*
39 *United States.*

1 (c) Notwithstanding subdivision (a), a habeas corpus case in
2 which the petition was filed before the effective date of this
3 chapter may continue under prior law, but the court may, for
4 good cause shown, convert the habeas proceeding into a motion
5 under this chapter and transfer it to the trial court.

6 1509.3. As used in this chapter, unless the context otherwise
7 requires:

8 (a) “Direct appeal” means the appeal pursuant to Chapter 1
9 (commencing with Section 1235) to the California Supreme
10 Court of any issues raised at the entry of a guilty plea, before
11 trial, at trial, at the penalty phase hearing, or in a motion for
12 new trial.

13 (b) “Direct appeal counsel” means the attorney retained by
14 the defendant, or appointed by the Supreme Court for purposes
15 of representing the defendant in direct appeal proceedings.

16 (c) “New postconviction counsel” means the attorney retained
17 by the defendant, or appointed by the trial court to represent an
18 indigent defendant, for the purposes of representing the
19 defendant in postconviction review and postconviction review
20 appeal proceedings. New postconviction counsel cannot have
21 previously represented the defendant with regard to the capital
22 felony charge.

23 (d) “Postconviction review” means review as provided in this
24 chapter by the trial court that occurs after conviction in a capital
25 felony case in which the death penalty is imposed as punishment.

26 (e) “Postconviction review appeal” means the appeal to the
27 California Supreme Court of any issues raised in postconviction
28 review proceedings.

29 (f) “Trial counsel” means the attorney who represents the
30 defendant with regard to the capital felony charge: For the
31 purposes of any guilty plea; before trial; at trial; at the penalty
32 phase hearing; for the purposes of a motion for new trial; for the
33 purposes of postconviction review if the defendant chooses to
34 continue with trial counsel for purposes of postconviction
35 review; and for the purposes of direct appeal if the defendant
36 chooses to continue with trial counsel for purposes of direct
37 appeal. “Trial counsel” does not include new postconviction
38 counsel appointed pursuant to Section 1509.5 or direct appeal
39 counsel.

1 1509.4. (a) After imposition of a sentence of death, the trial
2 court shall order the defendant, trial counsel, and the
3 prosecution to attend a hearing to be held after the date upon
4 which the sentence of death is imposed. At the hearing, the trial
5 court shall:

6 (1) Advise the defendant of the nature of review as provided in
7 this chapter.

8 (2) Advise the defendant of the right to direct appeal counsel.

9 (3) Advise the defendant that the issue of ineffective assistance
10 of trial counsel before trial, at trial, or during the penalty phase
11 hearing may only be raised on postconviction review and on
12 postconviction review appeal.

13 (4) Advise the defendant that the issue of ineffective assistance
14 of counsel on direct appeal counsel may only be raised by way of
15 a petition for a writ of habeas corpus filed in the California
16 Supreme Court by new postconviction counsel or the defendant.

17 (5) Determine whether the defendant intends to pursue
18 postconviction review.

19 (6) If the defendant intends to pursue postconviction review,
20 determine whether the defendant intends to proceed with or
21 without counsel.

22 (b) After a full discussion on the record, if the defendant
23 knowingly, voluntarily, and intelligently waives the right to
24 pursue postconviction review or the right to appointed counsel
25 for postconviction review, the trial court shall enter an order
26 finding that the waiver was knowing, voluntary, and intelligent.

27 1509.5. (a) At or after the hearing held pursuant to Section
28 1509.4, if the defendant chooses to pursue postconviction review,
29 the trial court shall enter an order appointing new postconviction
30 counsel for the defendant if the trial court finds that the
31 defendant is indigent and either the defendant requests and
32 accepts such appointment or the trial court finds that the
33 defendant is unable to competently decide whether to accept or
34 reject the appointment. However, the trial court shall not appoint
35 new postconviction counsel if any of the following apply:

36 (1) The defendant has retained new postconviction counsel.

37 (2) The defendant has elected to proceed without counsel and
38 the trial court finds, after a full discussion on the record, that the
39 defendant's election to proceed without counsel is knowing,
40 intelligent, and voluntary.

1 (3) *The defendant elects to have trial counsel continue*
2 *representing the defendant for purposes of postconviction review*
3 *and the trial court finds, after a full discussion on the record,*
4 *that all of the following apply:*

5 (A) *The defendant understands that new postconviction*
6 *counsel can be retained by the defendant for purposes of*
7 *postconviction review or appointed by the trial court for the*
8 *defendant if the defendant is indigent.*

9 (B) *The defendant understands that, by electing to have trial*
10 *counsel continue to represent the defendant for purposes of*
11 *postconviction review, the defendant waives the right to*
12 *challenge the effectiveness of trial counsel's representation at*
13 *any stage of the proceedings.*

14 (C) *The defendant's election to have trial counsel continue to*
15 *represent the defendant for purposes of postconviction review is*
16 *knowing, intelligent, and voluntary.*

17 (D) *Trial counsel agrees to continue representing the*
18 *defendant for purposes of postconviction review.*

19 (b) *In appointing new postconviction counsel to represent an*
20 *indigent defendant, the trial court shall appoint one or more*
21 *attorneys, at least one of whom meets the qualifications provided*
22 *in Section 1509.55.*

23 (c) *In any case in which the trial court appoints new*
24 *postconviction counsel or new postconviction counsel is retained,*
25 *the new postconviction counsel shall not be retained or*
26 *appointed to act as co counsel with trial counsel and shall not be*
27 *associated or affiliated with trial counsel. New postconviction*
28 *counsel shall exercise independent judgment and act*
29 *independently from trial counsel.*

30 (d) *The ineffectiveness of counsel during postconviction*
31 *review shall not be a basis for relief.*

32 1509.55. (a) *Except as provided in subdivision (b) of this*
33 *section, at least one attorney appointed to represent the*
34 *defendant in proceedings governed by this chapter shall have*
35 *been admitted to practice in California or another state for a*
36 *total of five years and have at least three years experience in the*
37 *handling of appeals or postconviction proceedings in felony*
38 *cases. Experience in defense and prosecution shall be considered*
39 *equally for this purpose.*

1 ***(b) The court, for good cause, may appoint an attorney not***
2 ***meeting the requirements of subdivision (a) whose background,***
3 ***knowledge, or experience would otherwise enable him or her to***
4 ***properly represent the defendant, with due consideration to the***
5 ***seriousness of the possible penalty and to the unique and***
6 ***complex nature of the litigation.***

7 ***1509.6. (a) (1) In any case in which a defendant has been***
8 ***convicted of a capital felony and been sentenced to death, all***
9 ***motions for postconviction review and all postconviction review***
10 ***proceedings are governed by this chapter and by the rules***
11 ***adopted to implement this chapter.***

12 ***(2) Any motion for postconviction review shall state with***
13 ***particularity the grounds upon which the defendant intends to***
14 ***rely, including a statement of the facts and citations of law. A***
15 ***motion for postconviction review may include only those issues***
16 ***specified in paragraph (3) of this subdivision (a). If any claim***
17 ***alleges a crime or violation of professional duty by any person,***
18 ***the motion shall include a declaration by counsel that he or she***
19 ***has investigated the claim and has probable cause to believe the***
20 ***allegation is true.***

21 ***(3) The claims to be considered on a motion for postconviction***
22 ***review are limited to claims that would have been proper***
23 ***grounds for relief from a judgment on a writ of habeas corpus***
24 ***under the law in effect prior to enactment of this chapter and***
25 ***which either (A) cannot be made on appeal because they are***
26 ***based on facts outside the appellate record, (B) allege ineffective***
27 ***assistance of trial counsel, or (C) meet the criteria for a***
28 ***successive petition under Section 1509.7.***

29 ***(b) By alleging that trial counsel rendered ineffective***
30 ***assistance, the defendant automatically waives the attorney client***
31 ***privilege between the defendant and trial counsel with respect to***
32 ***information that is related to the defendant's claim of ineffective***
33 ***assistance.***

34 ***(c) Neither the defendant nor the prosecution may file a***
35 ***motion for reconsideration or rehearing of the trial court's***
36 ***ruling on the motion for postconviction review. The granting or***
37 ***denying of a motion for postconviction review under this section***
38 ***is a final order reviewable on appeal by the California Supreme***
39 ***Court.***

1 (d) Unless relieved by the Supreme Court, postconviction
2 counsel shall continue to represent the defendant on appeal from
3 trial court's grant or denial of the motion. If the direct appeal is
4 completed, postconviction counsel shall concurrently evaluate
5 whether defendant has a substantial claim of ineffective
6 assistance of appellate counsel, and, if so, file a habeas corpus
7 petition for that claim in the Supreme Court.

8 1509.7. (a) The initial motion for postconviction review shall
9 be filed within six months of the appointment of counsel or of the
10 court's decision not to appoint counsel pursuant to Subdivision
11 (a) of Section 1509.5. An initial motion filed after that date and
12 any successive motion shall be dismissed unless it contains a
13 claim meeting the criteria under subdivision (b).

14 (b) A claim presented in a successive motion or an untimely
15 initial motion shall be dismissed unless one or more of the
16 following apply:

17 (1) The failure to raise the claim in a timely initial motion was
18 the direct result of interference by government officials with the
19 presentation of the claim in a manner which violated the
20 constitution or laws of the United States or California.

21 (2) The facts upon which the claim are based were unknown to
22 the defendant and could not have been ascertained by the
23 exercise of due diligence, and the defendant has a substantial
24 claim that he or she is actually innocent of the offense.

25 (3) The right asserted by the defendant is a constitutional right
26 that was recognized by the supreme court of either the United
27 States or California, the constitutional right applies retroactively
28 to defendant's case, and the motion is filed within 90 days of the
29 date of the decision, or, if retroactivity is not clearly established
30 at the time the right is recognized, within 90 days of the decision
31 making it retroactive.

32 (4) Clear and convincing evidence establishes that the
33 defendant is actually innocent of the offense.

34 (c) For the purpose of a claim of actual innocence under
35 paragraph (2) or (4) of subdivision (b), the court shall consider
36 all available evidence, regardless of its admissibility at trial. A
37 claim that goes only to sentence or degree of offense or a claim
38 based on voluntary intoxication or mental disease or defect is not
39 a claim of innocence for this purpose.

1 (d) Before a motion under subdivision (b) is filed in the
2 Superior Court, the party shall apply in the Supreme Court for
3 an order authorizing the Superior Court to consider the motion.
4 The Superior Court shall immediately dismiss any motion filed in
5 violation of this requirement. The Supreme Court shall grant the
6 application only if it determines that the application makes a
7 prima facie showing that the motion satisfies the requirements of
8 subdivision (b). The determination that a prima facie showing
9 has been made does not preclude a determination by the
10 Superior Court of whether the requirements are satisfied, and the
11 Superior Court shall dismiss the motion if it finds the
12 requirements are not satisfied. The Supreme Court shall decide
13 an application under this subdivision within 30 days of filing. An
14 application under this subdivision is not an “application for
15 State postconviction or other collateral review” within the
16 meaning of 28 U.S.C. Sec. 2244(d)(2), and a delayed or
17 successive motion filed without authorization is not “properly
18 filed” within the meaning of that section.

19 SEC. 6. In addition to all other positions currently provided
20 for, the Department of Justice shall increase the number of
21 attorney positions in the Criminal Division by six.